

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF GLEN COVE and WAH  
CHANG SMELTING AND REFINING  
COMPANY OF AMERICA, INC.,

CV-

(Platt, J.)

(M. Orenstein, Ch.M.J.)

Defendants.

-----X

**CONSENT JUDGMENT**

I.	<u>BACKGROUND</u> .....	3
II.	<u>JURISDICTION</u> .....	8
III.	<u>PARTIES BOUND</u> .....	9
IV.	<u>DEFINITIONS</u> .....	9
V.	<u>PAYMENT OF RESPONSE COSTS BY SETTLING DEFENDANT</u> .....	12
VI.	<u>FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT JUDGMENT</u> ...	14
VII.	<u>COVENANT NOT TO SUE BY THE PLAINTIFF</u> .....	16
VIII.	<u>COVENANT NOT TO SUE BY SETTLING DEFENDANT</u> .....	18
IX.	<u>EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION</u> .....	19
X.	<u>ACCESS TO INFORMATION</u> .....	22
XI.	<u>RETENTION OF RECORDS</u> .....	23
XII.	<u>NOTICES AND SUBMISSIONS</u> .....	25
XIII.	<u>MODIFICATION</u> .....	26
XIV.	<u>RETENTION OF JURISDICTION</u> .....	27
XV.	<u>INTEGRATION/APPENDICES</u> .....	27
XVI.	<u>LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u> .....	28
XVII.	<u>EFFECTIVE DATE</u> .....	28
XVIII.	<u>SIGNATORIES/SERVICE</u> .....	28
XIX.	<u>FINAL JUDGMENT</u> .....	29

## **I. BACKGROUND**

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), has filed a complaint in this matter pursuant to Sections 106(a) and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9606(a) and 9607, seeking injunctive relief and reimbursement of response costs incurred and to be incurred for response actions taken and to be taken at or in connection with the release or threatened release of hazardous substances at the Li Tungsten Superfund Site (the “Site”). The City of Glen Cove (“City”) is named as a defendant in the United States’ Complaint.

B. The Site is approximately 30 acres in size and includes two main areas. The first area is the former Li Tungsten Corporation facility, an inactive 26-acre industrial facility, located at the intersection of Herbhill Road, Dickson Lane and Garvies Point Road along the north bank of Glen Cove Creek in the City of Glen Cove, Nassau County, New York (the “Li Tungsten Property”). The second area includes radiologically-contaminated portions of the “Captain’s Cove Property,” which is located approximately 2,000 feet west of the Li Tungsten Property on Garvies Point Road in the City of Glen Cove, and similarly radiologically-contaminated areas adjacent thereto. The Li Tungsten Property and the Captain’s Cove Property are identified parcels included in a planned waterfront revitalization effort involving approximately 240 acres in Glen Cove, New York.

C. From approximately 1942 to 1985, tungsten ore and scrap and other non-ferrous metal ores and scrap were processed at the Li Tungsten Property, and waste containing hazardous substances was disposed of at the Li Tungsten Property. Ore residues from the Li Tungsten

Property were transported to and disposed of at the Captain's Cove Property, and it is believed that this disposal occurred from approximately the early 1950's until the late 1970's.

D. The City owned a portion of the Captain's Cove Property during a period of disposal activities there and thus was an owner at the time of disposal of hazardous substances at the Site. The City also apparently began using, or allowing the use of, portions of the Captain's Cove Property as a mixed-waste dumpsite in approximately 1953, and continued using it or allowing its use as such until approximately 1978. The Captain's Cove Property was at this time referred to as the "Garvies Point Dump" or "Garvies Point Landfill."

E. Commencing in 1993, EPA performed a Remedial Investigation ("RI") and a Feasibility Study for the Site, which among other things confirmed the presence of arsenic, lead, polychlorinated biphenyls, radionuclides (including Radium-226 and Thorium-232), tetrachloroethylene, and trichloroethylene at the Site. In addition, EPA performed certain cleanup measures from 1995 to 1998, including the extraction and decontamination of 271 tanks and the demolition of several buildings at the Site. EPA completed a RI for the Site in May 1998. A Record of Decision which set forth the remedy for the Site was issued by EPA on September 30, 1999 ("1999 ROD"). The remedy selected in the 1999 ROD for the Site includes, *inter alia*, a plan for addressing radioactive materials and other hazardous substances located at the Site.

F. In approximately January 2000, EPA commenced the implementation of "Phase 1" of the remedy selected in the 1999 ROD. The Phase 1 activities included the excavation and segregation of contaminated sediments and soils from the areas designated as Parcel A and the southern portion of Parcel C at the Li Tungsten Property. The non-radioactive, metals-

contaminated sediments, soils, and debris from these locations were disposed of off-site. The radioactive portions of the sediments, soils, and debris which were excavated and segregated during Phase 1 were placed in storage and were eventually disposed of in the Spring of 2004.

G. On May 15, 2000, EPA issued an administrative order pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), Index Number CERCLA-02-2000-2013 ("RD UAO"), directing twenty-eight parties to perform the remedial design of certain portions of the remedy selected in the 1999 ROD. The design work required pursuant to the RD UAO has been completed.

H. On September 29, 2000, EPA issued a second administrative order pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), Index Number CERCLA-02-2000-2037 ("RA UAO"), directing twenty-eight parties to implement certain portions of the remedial action selected in the 1999 ROD. On February 8, 2001, EPA directed the RD UAO and the RA UAO recipients to increase the scope of the work required under those Orders to also include, in summary, (a) an expansion of the remedial design to include the southern portion of the area designated as Parcel B at the Li Tungsten Property, (b) the implementation of EPA's selected remedy with regard to the southern portion of Parcel B, and (c) the implementation of a larger portion of EPA's selected remedy with regard to the Captain's Cove Property.

I. In September 2000, EPA and the City entered into an agreement pursuant to Section 122(h) of CERCLA, 42 U.S.C. § 9622(h), Index Number CERCLA-02-2000-2019, pursuant to which the City provided EPA with \$3 million to fund EPA's performance of certain response activities at the Captain's Cove Property. EPA commenced those activities in approximately December 2000 at the Captain's Cove Property. The agreement was amended, effective in May 2003. The amendment increased the amount of funding provided by the City for EPA's

performance of these activities to \$3.4 million. Neither the September 2000 agreement nor its May 2003 amendment compromised any claims that the United States may have against the City.

J. In approximately September 2000, the U.S. Army Corps of Engineers ("COE") commenced a navigational dredging project in Glen Cove Creek, which is on the southern boundary of the Li Tungsten and Captain's Cove Properties. Before the COE began dredging, testing was performed on materials in Glen Cove Creek, but no radioactive contamination was detected. Approximately 28,000 cubic yards of dredge spoils were staged on Parcel A of the Li Tungsten Property for the purpose of allowing the dredge spoils to dewater. In May 2001, EPA became aware that the dredge spoils were contaminated with radioactive material and determined that a removal action to segregate and dispose of the radiologically contaminated portion of the dredge spoils was warranted under CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"). On August 14, 2001, EPA issued another administrative order relating to the Site, Index Number CERCLA-02-2001-2035, which directed nine parties to segregate and dispose of the radiologically contaminated portion of the dredge spoils. The work under this August 2001 Order has been completed.

K. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on October 14, 1992. 57 Fed. Reg. 47180. In 1995, consistent with Section 104(d) of CERCLA, 42 U.S.C. § 9604(d), the Site was expanded to include those areas on and adjacent to the Captain's Cove Property where radioactive materials were disposed. Other portions of the Captain's Cove Property have been remediated by the City under an administrative order with the State of New York. The cost of that action is estimated by the City to be in excess of \$5.5

million.

L. On February 22, 1999, in accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior and the National Oceanic and Atmospheric Administration of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship.

M. The City has provided the Plaintiff with information documenting its financial condition to support its contention that it cannot afford to reimburse the Plaintiff for response costs at the Site in an amount greater than set forth in this Consent Judgment. After reviewing this information, the United States has determined that the City has a limited ability to pay and that the settlement embodied herein represents an appropriate resolution of the United States' claim against Settling Defendant for unreimbursed costs incurred or to be incurred by the United States in responding to the release and threatened release of hazardous substances at the Site.

N. As set forth in Paragraph I, the City has paid \$3.4 million to the United States to be used for the remediation of the Site pursuant to an agreement between EPA and the City. In addition, during the period of 2000-2003, the City has provided in-kind services in connection with the remediation of the Site that are valued at \$200,000.

O. Settling Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the United States' Complaint or herein. Nor does it acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

P. The objectives of the Parties in entering into this Consent Judgment are to help protect human health and the environment at the Site, to reimburse response costs of the United States, and to resolve the claims of the United States against Settling Defendant and the claims of Settling Defendant which have been or could have been asserted against the United States with regard to this Site as provided in this Consent Judgment.

Q. This Consent Judgment shall have no effect on the Agreement and Covenant Not to Sue, Index No. CERCLA-02-99-2008, entered into in 1999 regarding the Site between the United States and the Glen Cove Industrial Development Agency, and that Agreement and Covenant Not to Sue remain in effect.

R. The United States and Settling Defendant agree, and the Court by entering this Consent Judgment finds, that this Consent Judgment has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation among the Parties, and that this Consent Judgment is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Judgment, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Judgment and the underlying Complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Judgment or this Court's jurisdiction to enter this Consent Judgment. Settling



Defendant shall not challenge this Court's jurisdiction to enforce this Consent Judgment.

### **III. PARTIES BOUND**

2. This Consent Judgment applies to and is binding upon the United States, on behalf of EPA, and upon Settling Defendant and its successors and assigns. Any change in the legal status of Settling Defendant, including but not limited to any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Judgment.

### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Judgment that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Judgment or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

b. "Consent Judgment" shall mean this Consent Judgment and all appendices attached hereto. In the event of conflict between this Consent Judgment and any appendix, the Consent Judgment shall control.

c. "Creek Operable Unit" shall mean the operable unit designated by EPA in connection with the Site for the performance of response actions to address potential residual contamination in Glen Cove Creek, including contiguous wetlands.

d. "Creek Operable Unit Costs" shall mean the response costs which may be incurred by any entity (including any entity not a Party to this Consent Judgment) after July 25, 2003 in

connection with the Creek Operable Unit. "Creek Operable Unit Costs" do not include any of the costs of implementing the 1999 ROD.

e. "Day" shall mean a calendar day. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next Working Day. "Working Day" shall mean a day other than a Saturday, Sunday, or Federal holiday.

f. "DOJ" shall mean the United States Department of Justice, including the United States Attorney's Office for the Eastern District of New York, and any successor departments, agencies, or instrumentalities of the United States.

g. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

h. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507, or any successor fund or Treasury account as may be designated in the future for receipt of cost recovery payments under CERCLA.

i. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

j. "Paragraph" shall mean a portion of this Consent Judgment identified by an arabic numeral or an upper or lower case letter.

k. "Party" or "Parties" shall mean the United States and/or Settling Defendant.

l. "Plaintiff" shall mean the United States on behalf of EPA.

m. "Record of Decision" or "1999 ROD" shall mean the EPA Record of Decision relating to the Li Tungsten Superfund Site signed on September 30, 1999 by the Regional Administrator of EPA Region 2 or her delegate, and all attachments, amendments and Explanations of Significant Differences relating thereto that are in existence as of the date of lodging of this Consent Judgment.

n. "Section" shall mean a portion of this Consent Judgment identified by an upper case roman numeral.

o. "Settling Defendant" shall mean the City of Glen Cove, New York.

p. "Site" shall mean the Li Tungsten Superfund Site, which includes: (1) the Li Tungsten Property; (2) the radiologically-contaminated portions of the Captain's Cove Property, which is located approximately 2,000 feet west of the Li Tungsten Property on Garvies Point Road in the City of Glen Cove; and (3) nearby areas where radiologically-contaminated and/or metals-contaminated materials associated with the Li Tungsten Corporation facility were released, disposed of, or otherwise came to be located, including portions of Glen Cove Creek. For illustrative purposes only, the approximate boundaries of the Site are depicted generally on the map included as Appendix A to this Consent Judgment.

q. "State" shall mean the State of New York.

r. "United States" shall mean the United States of America, including all of its departments, agencies, and instrumentalities.

s. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42

U.S.C. § 9601(33); and (3) any “solid waste” under Section 1004(27) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6903(27).

**V. PAYMENT OF RESPONSE  
COSTS BY SETTLING DEFENDANT**

4. a. As indicated in Section I, Paragraphs I and N, the City has paid to EPA or incurred costs totaling \$3.6 million relating to the Site. Within thirty (30) days of the effective date of this Consent Judgment, the City shall pay an additional \$1,600,000.00, plus an additional sum for Interest on that amount calculated as follows:

i. if the City executes and returns this Consent Judgment to DOJ within five days of the date of its receipt of this Consent Judgment, and payment is timely, no Interest shall accrue;

ii. if the City executes and returns this Consent Judgment to DOJ within five days of the date of its receipt of this Consent Judgment, but payment is not timely, Interest shall be calculated from the date 30 days after the effective date of this Consent Judgment until the date of payment; and

iii. if the City executes and returns this Consent Judgment to DOJ later than five days after its receipt of this Consent Judgment, Interest shall be calculated commencing on the fifth day after receipt by the City of this Consent Judgment and continue until the date of payment.

b. Payment of the amounts set forth in Paragraph 4.a. shall be made via FEDWIRE Electronic Funds Transfer to DOJ in accordance with the attached instructions set forth at Appendix B to this Consent Judgment, entitled EPA Superfund FedWire, and shall reference

EPA Region II, Site/Spill Identification Number 024L, USAO Number 1999V00190 and DOJ Case Number 90-11-3-06561/2. Any payments received after 4:00 p.m. Eastern Time shall be credited on the next business day. Notice shall be sent to EPA that payment has been made in accordance with Section XII ("Notices and Submissions") and to Financial Management Officer, U.S. Environmental Protection Agency, 290 Broadway, New York, New York 10007-1866 and Brenda Hinkson, United States Attorney's Office, Eastern District of New York, Financial Litigation Unit, 147 Pierrepont Street, Brooklyn, New York 11201.

c. The total amounts to be paid pursuant to Paragraph 4.a. shall be deposited in the Li Tungsten Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

d. Settling Defendant agrees to pay to the United States proceeds from any insurance policies, minus reasonable attorneys' fees and administrative costs, which are paid to Settling Defendant after December 30, 2002, with respect to or on account of the Site after entry of this Consent Judgment, within thirty (30) days of Settling Defendant's receipt of the funds, in accordance with the terms set forth below:

(i) After deducting reasonable attorneys' fees and administrative costs from the insurance proceeds received, Settling Defendant shall pay 90% of the remaining proceeds to the United States. Settling Defendant shall pay the insurance proceeds to the United States in accordance with the payment instructions in Paragraph 4.b.

(ii) In the event that payment required by this Paragraph 4.d. is not made within thirty (30) days of receipt of the insurance proceeds by Settling Defendant, Settling Defendant

shall also pay Interest on the unpaid balance. Interest shall begin to accrue on the thirtieth (30th) day after Settling Defendant's receipt of the insurance proceeds.

**VI. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT JUDGMENT**

5. Interest on Late Payments. If Settling Defendant fails to make any payment under Paragraph 6 by the required due date, Interest shall accrue on the unpaid balance from the due date through the date of payment.

6. Stipulated Penalty.

a. If Settling Defendant fails to make any payment under Paragraph 4 by the required due date, Settling Defendant shall be in violation of this Consent Judgment and shall pay as a stipulated penalty, in addition to the Interest required by Paragraph 4, \$1,000 per violation per day that such payment is late.

b. The stipulated penalties due pursuant to Paragraph 6.a. are due and payable within thirty (30) days of the date of the demand for payment of the penalties by EPA. All payments under this Paragraph shall be identified as "stipulated penalties" and shall be made via electronic funds transfer ("EFT") to Mellon Bank, Pittsburgh, Pennsylvania. Settling Defendant shall provide the following information to its bank:

- Amount of payment
- Title of Mellon Bank account to receive the payment: EPA
- Account code for Mellon Bank account receiving the payment:
- Mellon Bank ABA Routing Number:
- Name of paying Settling Defendant: City of Glen Cove, New York
- Case number:

- Site/spill identifier: 024L

At the time of payment, Settling Defendant shall send notice of such payment to the United States in accordance with Section XII (Notices and Submissions) and to the Comptroller, Financial Management Branch, U.S. Environmental Protection Agency, Region II, 290 Broadway, New York, NY 10007-1866.

c. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Judgment.

7. If the United States brings an action to enforce this Consent Judgment, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time and court fees.

8. Payments made under Paragraphs 5 through 7 shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Judgment.

9. Notwithstanding any other provision of this Section, the United States may, in its own unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Judgment. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section V or from performance of any other requirements of this Consent Judgment.

**VII. COVENANT NOT TO SUE BY THE PLAINTIFF**

**10. Covenants by United States to Settling Defendant**

In consideration of the actions that will be performed by the City under the terms of this Consent Judgment, and except as specifically provided in Paragraph 11, the United States covenants not to sue or take administrative action against the City pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), relating to the Site, including the Creek Operable Unit. These covenants shall take effect for Settling Defendant upon receipt by the United States of the payments that are required under Paragraph 4 of this Consent Judgment and any amount due under Section VI (Failure to Comply with Requirements of Consent Judgment). These covenants are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Judgment. These covenants are also conditioned upon the accuracy, veracity, and completeness of the financial information provided to EPA for Settling Defendant. If the financial information is subsequently determined by EPA to have been misleading, false, or materially inaccurate at the time it was provided or if EPA determines that the City's ability to pay has, in light of all circumstances, materially increased between the time such financial information was submitted to the United States and the time the City executes this Consent Judgment, then notwithstanding any other provision of this Consent Judgment, the United States reserves, and this Consent Judgment is without prejudice to, the right to reinstate or reopen this action or to commence a new action against Settling Defendant, and Settling Defendant shall forfeit all payments made pursuant to this Consent Judgment and this covenant not to sue and the contribution protection set forth in Paragraph 16 shall be null and void as to Settling Defendant. EPA shall notify Settling Defendant prior to making a final determination



that the financial information was misleading, false, or materially inaccurate or that the City's ability to pay has, in light of all circumstances, materially increased during the relevant period established above. In any such notification, EPA will provide Settling Defendant with no less than 30 days from that notification to supplement the financial or other information to demonstrate to EPA that the financial information was not misleading, false, or materially inaccurate or that the City's ability to pay has not materially increased. EPA, in its sole discretion, will be the final arbiter of the determination regarding the effectiveness of the covenant and any such forfeiture. Such forfeiture shall not constitute liquidated damages but shall be credited toward Settling Defendant's share of potential liability at the Site, and such credit shall not in any way foreclose the United States' right to pursue any other causes of action arising from Settling Defendant's false or materially inaccurate information. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

11. Reservation of Rights by the United States

The covenants set forth in Paragraph 10 do not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Judgment is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to those matters set forth below in subparagraphs 11 (i) - (vi).

(i) claims based on a failure by Settling Defendant to meet a requirement of this Consent Judgment;

(ii) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;

(iii) liability, based upon Settling Defendant's ownership or operation of the Site,

or upon Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a Waste Material at or in connection with the Site, after signature of this Consent Judgment by Settling Defendant;

(iv) liability for damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss;

(v) criminal liability; and

(vi) liability for violations of federal or state law.

#### **VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

12. a. Subject to Paragraph 12.b., Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Consent Judgment, including but not limited to:

(i) any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law;

(ii) any claims under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, and any claims under State law, that are related to the Site;

(iii) any claims arising out of response activities at the Site, including claims based on EPA's selection of response actions, oversight of response activities, or approval of plans for such activities;

(iv) any claims (including both injunctive claims and claims for monetary damages) for costs, attorney's fees, other fees, or expenses related to the Site or this Consent Judgment, or incurred in this civil action, or any administrative action, including claims under 28

U.S.C. § 2412 (including, but not limited to, claims under the Equal Access to Justice Act, as amended, 28 U.S.C. § 2412(d)); and

(v) any claim under the United States Constitution, State Constitution, Tucker Act, 28 U.S.C. § 1491, or common law, relating to the Site.

b. Except as provided in Paragraph 14 and Paragraph 18, Settling Defendant's covenant not to sue, contained in Paragraph 12.a., shall not apply in the event the United States brings a cause of action against or issues an order to Settling Defendant pursuant to the reservations set forth in Paragraph 11.a.(ii)-(iv), but only to the extent that Settling Defendant's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

13. Nothing in this Consent Judgment shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

14. Settling Defendant agrees not to assert any CERCLA claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendant.

#### **IX. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

15. a. Except as provided in Paragraph 14, nothing in this Consent Judgment shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Judgment. Except as provided in Paragraph 14, Settling Defendant expressly reserves

any and all rights, defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

b. The United States expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

16. a. The Parties agree, and by entering this Consent Judgment this Court finds, that Settling Defendant is entitled, as of the effective date of this Consent Judgment, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Judgment. The “matters addressed” in this Consent Judgment are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person with respect to the Site, including the Creek Operable Unit Costs.

b. The “matters addressed” in this settlement do not include those response costs or response actions as to which the United States or EPA has reserved its rights under this Consent Judgment (except for claims for failure to comply with this Consent Judgment) in the event that the United States or EPA asserts rights against Settling Defendant within the scope of such reservations.

17. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Judgment, it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also

agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Judgment, it will notify the United States in writing within ten (10) days of service or receipt of the complaint or claim upon it. In addition, for matters related to this Consent Judgment, Settling Defendant shall notify the United States within ten (10) days of service or receipt of any Motion for Summary Judgment, and within ten (10) days of receipt of any order from a court setting a case for trial.

18. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VII.

19. Settling Defendant agrees to cooperate in the implementation of all response actions at the Site and recognizes that response actions may be performed by contractors, consultants, agents, or authorized representatives of EPA or by other potentially responsible parties under the terms of an administrative order or consent decree. Settling Defendant agrees neither to interfere with such response actions nor take actions at the Site that are inconsistent with any response action selected by EPA for the Site.

20. Notwithstanding any provision of this Consent Judgment, the United States retains all of its access authorities and rights, including enforcement authorities related thereto, under

CERCLA, RCRA, and any other applicable statutes or regulations.

**X. ACCESS TO INFORMATION**

21. Settling Defendant shall provide to EPA, upon request, the original or copies of all documents and information within their possession or control or that of their contractors or agents relating to potential liability and response activities at the Site or to the implementation of this Consent Judgment, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site. EPA may agree, in its sole discretion, to review and copy any such documents at its own expense.

22. Confidential Business Information and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under the preceding Paragraph or Section XII (Retention of Records) to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, the public may be given access to such documents or information without further notice to Settling Defendant.

b. Settling Defendant may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of

the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other consent judgment or consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records and documents that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and then until any such dispute has been resolved in Settling Defendant's favor.

23. No claim of confidentiality shall be made with respect to any data, including but not limited to all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

#### **XI. RETENTION OF RECORDS**

24. Until ten (10) years after the entry of this Consent Judgment, Settling Defendant shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site.

25. After the conclusion of the document retention period in the preceding Paragraph, Settling Defendant shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendant

shall deliver any such records or documents to EPA. Settling Defendant may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records and documents that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Defendant's favor.

26. By signing this Consent Judgment, Settling Defendant certifies that, to the best of its knowledge and belief, it has:

a. not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site, after notification of potential liability and/or the filing of a suit against Settling Defendant regarding the Site, whichever is earlier;

b. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e); and



c. provided to EPA financial information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time such financial information was submitted to the United States and the time that Settling Defendant executes this Consent Judgment.

## **XII. NOTICES AND SUBMISSIONS**

27. Whenever, under the terms of this Consent Judgment, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Judgment with respect to the United States, EPA, and Settling Defendant, respectively.

### **As to the United States:**

United States Attorney's Office  
Eastern District of New York  
147 Pierrepont Street  
Brooklyn, New York 11201

Re: 1999V00190

and

Chief, Environmental Enforcement Section  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

Re: DJ # 90-11-3-06561/2

and

Office of Regional Counsel  
New York/Caribbean Superfund Branch  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

Attn: Li Tungsten Site Attorney

and

Emergency and Remedial Response Division  
New York Remediation Branch  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

Attn: Li Tungsten Site Project Manager

As to Settling Defendant:

Mayor Maryann Holzkamp  
City of Glen Cove  
City Hall  
15 Glen Street  
Glen Cove, NY 11542

Daniel Deegan, Esq.  
Crowe, Deegan & Dixon  
1 School St.  
Glen Cove, NY 11542

Twomey, Latham, Shea & Kelley, LLP  
33 West Second Street  
P.O. Box 9398  
Riverhead, New York 11901

**XIII. MODIFICATION**

28. No material modification shall be made to this Consent Judgment without the written agreement of the United States and the City and the written approval of the Court. Modifications

to this Consent Judgment that do not materially alter the Consent Judgment may be made by written agreement of the United States and the City and shall become effective upon filing with the Court. A request for a modification of this Consent Judgment that does not materially alter the Consent Judgment shall be deemed agreed to by Settling Defendant if Settling Defendant does not notify the United States of its objection to the modification request within thirty days of the date of mailing of the request for modification to Settling Defendant. Nothing in this Consent Judgment shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Judgment.

#### **XIV. RETENTION OF JURISDICTION**

29. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Judgment.

#### **XV. INTEGRATION/APPENDICES**

30. a. This Consent Judgment and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Judgment. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Judgment.

b. The following appendices are attached to and incorporated into this Consent Judgment:

“Appendix A” is a map of the Site.

“Appendix B” is the EPA Superfund FedWire Instruction Form.

**XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

31. This Consent Judgment shall be lodged with the Court for a period of not fewer than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Judgment disclose facts or considerations indicating that this Consent Judgment is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Judgment without further notice.

32. If for any reason this Court should decline to approve this Consent Judgment in the form presented, this agreement is voidable at the sole discretion of any Party, and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XVII. EFFECTIVE DATE**

33. The effective date of this Consent Judgment shall be the date upon which it is entered by the Court.

**XVIII. SIGNATORIES/SERVICE**

34. The undersigned representative of Settling Defendant to this Consent Judgment and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Judgment and to execute and bind legally such Party to this document.

35. Settling Defendant hereby agrees not to oppose entry of this Consent Judgment by this Court or to challenge any provision of this Consent Judgment unless the United States has notified the City in writing that it no longer supports entry of the Consent Judgment.

36. Settling Defendant shall identify, on the attached signature page, the name and

address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Judgment. The City hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

**XIX. FINAL JUDGMENT**

37. Upon approval and entry of this Consent Judgment by the Court, this Consent Judgment shall constitute a final judgment between and among the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2005.

---

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of United States v. City of Glen Cove, et al. relating to the Li Tungsten Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: \_\_\_\_\_

\_\_\_\_\_  
KELLY JOHNSON  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

ROSLYNN R. MAUSKOPF  
United States Attorney  
Eastern District of New York  
One Pierrepont Plaza, 14th Fl.  
Brooklyn, New York 11201

Date: \_\_\_\_\_


\_\_\_\_\_  
DEBORAH B. ZWANY (DBZ 7987)  
Assistant U.S. Attorney

-31-

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of United States v. City of Glen Cove, et al. relating to the Li Tungsten Superfund Site.

FOR EPA:

Date: 6/23/05

 WILLIAM McCABE, Acting Director  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency  
290 Broadway  
New York, New York 10007-1866

-32-

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of United States v. City of Glen Cove, et al. relating to the Li Tungsten Superfund Site.

FOR DEFENDANT CITY OF GLEN COVE

Date:

6/21/05

Name

OUO

Title

Mayor

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Daniel P. Deegan, Esq.Title: City AttorneyAddress: One School Street  
Glen Cove, NY 11542